IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 691 of 1995

with

CRIMINAL APPEALS No. 714 & 815 of 1995

For Approval and Signature:

Hon'ble ACTING CHIEF JUSTICE MR.JN BHATT
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NARENDRA @ EAKKO

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 691 of 1995
   MR HN JHALA for the appellant.
   MS DEVANI, APP, for the respondent.
2. Criminal Appeal No. 714 of 1995
   MRS SHILPA J UNWALLA for the appellant.
   MS DEVANI, APP, for the respondent.
3. Criminal Appeal No.815 of 1995
   MR MJ BUDHBHATTI for the appellant.

MS DEVANI, APP, for the respondent.

CORAM : ACTING CHIEF JUSTICE MR.JN BHATT
and
MR.JUSTICE A.L.DAVE

Date of decision: / /2003

C.A.V. JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. These three appeals are filed to challenge the judgment and order of learned Additional City Sessions Judge, Court No.19, Ahmedabad, in Sessions Case No.303 of 1994, dated June 26, 1995. All the appellants were accused persons before the Trial Court, who have been convicted for the offence punishable under Section read with Section 34 of the Indian Penal Code and have been ordered to undergo imprisonment for life by the Trial Court.

2. The facts leading to the incident can be narrated thus:-

2.1 In the early morning hours of April 30, 1994, a quarrel took place between one Mukesh Jivanlal and Nagar alias Polo Karsan Solanki, at about 1.30 A.M. Somehow, due to intervention of well wishers, the matter ended there. But a few hours thereafter, at about 7.00 A.M., when Nalin Jivabhai, brother of Mukesh was seeking passengers, it is alleged that Nagar alias Polo, Narendra alias Appo and Ashok Nathalal assaulted Nalin Jivabhai, near S.T. Bus Stand, opposite Kodiyar Timber Mart, in Ahmedabad. Nagar alias Polo inflicted a series of stab injuries on deceased-Nalin. Narendra alia Akho and Ashok Nathalal gave fist blows to the deceased, which facilitated giving of subsequent knife blows by Nagar. Ultimately, the deceased succumbed to the injuries. It was also the case of the prosecution that Karsan Mathur and Sajuben Karsan caused disappearance of evidence by washing away the clothes of accused. An F.I.R. was lodged with Gaekwad Haveli Police Station, Ahmedabad, at C.R. No.81 of 1994. After investigation, the Investigating Agency, having found sufficient evidence against the accused persons, filed charge sheet. The learned Metropolitan Magistrate, having found that the offences were triable, exclusively, by a Court of Sessions, committed the case to the Court of Sessions and Sessions Case No.303 of 1994 came to be registered. The charges were framed against the accused persons at Ex.1. The accused persons pleaded not guilty to the charge and

claimed to be tried. After considering the evidence led by the prosecution, the learned Additional Sessions Judge came to a conclusion that the prosecution failed to establish the charges against Karsan Mathur and Sajuben Karsan and recorded their acquittal, whereas Nagar alias Polo, Ashok Nathalal and Narendra alias Appo, who were accused Nos. 1, 2 and 3, respectively, came to be convicted and sentenced by the Trial Court, as stated above.

2.2 Nagar alias Polo Karsan Solanki-original accused No.1 has preferred Criminal Appeal No.714 of 1995, Ashok Nathalal Makwana-original accused No.2 has preferred Criminal Appeal No.815 of 1995 and Narendra alias Akho Topandas Sindhi-original accused No.3 has preferred Criminal Appeal No.891 of 1995. For the sake of convenience, these appellants would be addressed to as accused No.1, 2 or 3, as the case may be, hereafter.

2.3 The State of Gujarat has not preferred any appeal against the acquittal of original accused Nos.4 and 5, namely, accused-Karsan Mathur and Sajuben Karsan.

3. Learned Advocate, Mrs. Unwalla, appearing for accused No.1, appellant in Criminal Appeal 714 of 1995, submitted that the prosecution story is unbelievable and is full of fantacies. She submitted that the case of the prosecution mainly depends on depositions of eye-witnesses - Keshav Ramji (Ex.12) and Sultan Haider (Ex.16). None of these witnesses inspire any confidence because of their conflicting versions and their conduct at the time of the incident and after the incident. They do not disclose the fact of their having witnessed the incident till their statement is recorded by police after a couple of days. They do not intervene in the incident. Their presence at the time of the incident appears to be a concoction. They can be considered as chance witnesses and little weightage can be given to such evidence. Mrs. Unwalla submitted that accused No.1 is alleged to have caused as many as 10 stab injuries. In the entire transaction, there appears not a single injury on his person. There is no evidence of any common intention and, therefore, the appeal by accused No.1 may be allowed.

4. Learned Advocate, Mr. Budhbhatti, appearing for accused No.2, appellant in Criminal Appeal No.815 of 1995, submitted that, through out the evidence led by the prosecution, specific identity of the accused and his complicity is not established. What has come on record is only his first name and there could be many such

persons with similar name in a city like Ahmedabad. Mr. Budhbhatti submitted that the incident had occurred at the time and place where there would be thick population. No independent witness is examined. The conduct of the witnesses is also such that they kept their mouth shut for two days after the incident till their statement was recorded by the Police. It has come on evidence that the incident has occurred nearby the Police Chowky. The Police Station is also nearby and, therefore, the evidence of eye-witnesses does not inspire confidence. It was contended by the learned Advocate, Mr. Budhbhatti, that no Test Identification Parade was conducted. The Investigating Officer ought to have conducted T.I. Parade when the witnesses do not fix identity of any of the accused. This conduct on the part of the prosecution may be treated as fatal to the prosecution case. Mr. Budhbhatti submitted that, though the case of the prosecution is that, after inflicting a few knife blows, the deceased ran across the road, where he was chased by accused No.1, followed by accused Nos.2 and 3, where accused No.1 again inflicted repeated knife blows, no blood marks were noticed by the Police. He, therefore, submitted that the Panchnama is also not properly drawn and the version given by the eye-witnesses is not correct. Mr. Budhbhatti, therefore, submitted that the appeal may be allowed and accused No.2 may be acquitted.

5. Accused No.3-appellant in Criminal Appeal No.691 of 1995 is represented by learned Advocate, Mr. H.N. Jhala. He, by and large, adopted the arguments of learned Advocate, Mr. Budhhatti, and submitted that the case against accused No.3-Narendra alias Appo Topandas Sindhi also suffers from the same defects as that of the case of accused-Ashok Nathalal Makwana. He, therefore, submitted that the appeal may be allowed.

6. The appeals are opposed to by learned Additional Public Prosecutor, Ms. Devani. She has taken us through the depositions of Keshav Ramji and Sultan Haider. She submitted that accused No.1 has given as many as 10 stab blows which are proved to be fatal and, therefore, his complicity is established beyond doubt. She submitted that simply because the witnesses do not go to police or disclose the information about the incident to anybody else, their depositions may not be disbelieved. She submitted that different persons react to such a sudden shocking incident in different manner and, therefore, simply because the witnesses have not conducted themselves in a particular manner, their depositions may not be disbelieved.

6.1 So far as accused Nos.2 and 3, appellants in Criminal Appeals No.815 and 691 of 1995 are concerned, Ms. Devani submitted that they have actively participated in the incident. When the first blow was given by accused No.1, the deceased caught hold of hands of accused No.1 and, at that time, accused Nos. 2 and 3 gave fist blows upon the deceased because of which the deceased had to give up the grip over the hands of accused No.1. Thus, by the act of accused Nos.2 and 3, the deceased was rendered defenceless or was deprived of his self-defence which, ultimately, cost him his life. Ms. Devani subitted that this active participation in the form of giving fist blows to help accused No.1 to inflict injuries would attract Section 34 of I.P.C.

7. In reply, it was contended on behalf of the appellants that there is no medical evidence to show that fist blows were given to the deceased. No external injury or internal injury is noticed either during preparation of Inquest Panchnama or during preparation of post-mortem notes, which can be co-related with fist blows. It was also contended that Section 34 could not have been considered for recording conviction for murder by the Trial Court. There is nothing to indicate formation of common intention prior to the incident. In fact, only one blow was given whereafter it was accused No.1 who chased the deceased and inflicted other injuries. Therefore, at the time when subsequent knife blows were given, it cannot be said that accused Nos. 2 and 3 were parties thereto or in any manner contributed to infliction of those injuries. It was, therefore, urged that the appeals may be accepted.

8. We have been taken through the record and proceedings. We have also given a close look to the evidence as well as the judgment and order impugned before us.

9. We find that the prosecution case depends mainly on deposition of two witnesses, namely-Keshav Ramji (Ex.12) and Sultan Haider (Ex.16). They both claim to be eye-witnesses and implicate the appellants.

10. Witness Keshav Ramji (Ex.12) says that, he is an auto-rickshaw driver. He knows accused-Nagar, Ashok and Appo Sindhi as they are also rickshaw drivers. He says that, at the time of the incident, he was standing near Kodiyar Timber Mart, waiting for passengers as a luxury bus had just come from outstaion. At that time, Appo Sindhi (accused No.3) came in his rickshaw. Accused No.1

and 2 were sitting in the auto-rickshaw in the passenger seat. Deceased-Nalin was also present there. Accused Nagar inflicted a knife blow on chest of Nalin. Nalin, therefore, caught hold of both the hands of Nagar. At that time, accused-Ashok and Appo Sindhi started giving fist blows to deceased-Nalin and because of the fist blows, the grip of deceased-Nalin over the hands of Nagar was released. Nalin, thereafter, started running across the road raising cries for help. All the three accused persons followed deceased-Nalin on the other side of the road where he had fallen down and accused No.1-Nagar inflicted knife blows successively on deceased-Nalin. The witness says that, he did not count the number of blows. Thereafter, all the three persons escaped from the place in the rickshaw towards Jamalpur Circle.

10.1 During cross-examination, it revealed that deceased-Nalin was also known as "Pappu" and "Mama". He says that the incident lasted for about five minutes. He says that the passengers present over there were scared and raised no shouts. He denies the suggestion that a Traffic Policeman is posted near this junction at about 7.00 A.M. every day. The witness admits that there is a Police Chowky, which is about 200 steps away. He says that because of the fear, it did not occur to him that he should approach the Police. He says that, after the incident, he went to Kalupur Railway Station and, by that time, he had become normal. He, however, did not inform the police at the Kalupur Railway Station Police Chowky. Despite a close scrutiny of the cross-examination part of the deposition of this witness, we hardly find any material which can be of any help to the accused persons. The witness says that when Nalinbhai fell down with his face down, about 8 to 10 knife blows were inflicted. It was contended that only one stab injury was found in the back of the deceased, as per medical evidence. Therefore, this witness is not telling the truth. This aspect would be considered at the relevant time in the paragraphs to follow.

11. Another witness-Sultan Haider is examined at Ex.16. He says the same story. He is also a rickshaw driver. He was present at the place of incident looking for passengers. At that time, accused Nos. 1, 2 and 3 came in a rickshaw, which was driven by accused No.3. Accused No.1 inflicted a knife blow on the chest of the deceased. The deceased, therefore, caught hold of hands of accused No.1 and, at that time, accused Nos. 2 and 3 gave fist blows on the deceased. Accused No.1-Nagar, therefore, was successful in getting his hands released. About 3 to 4 knife blows were given in chest by accused

No.1. Thereafter, the deceased started running. He crossed the road and went to the other side and fell down with his face down. The three accused persons chased the deceased where accused No.1-Nagar again inflicted knife blows on the back of the deceased and, thereafter, the three accused persons went away in the auto-rickshaw. The witness identifies the knife. He has been cross-examined at length on behalf of the accused persons. He also says that he did not inform the police as he was scared. He admits that, while going from the place of incident to Kalupur Railway Station, Astodia and Kagdapith Police Stations fell on the way. The cross-examination does not reveal anything which can strengthen the defence case or weaken the prosecution case.

12. The medical evidence, in the form of deposition of Dr. Dipak Desai is at Ex.13. Dr. Dipak Desai, who had performed the post-mortem, says that he had noticed 10 stab wounds and one abrasion contusion on the body of the deceased. He had noticed internal injuries as well. In his opinion, the cause of death was shock due to haemorrhage as a result of the injuries sustained by the deceased. The injuries were possible with a sharp cutting instrument like muddamal article No.59. The post-mortem note is at Ex.50.

13. Complainant-Mukesh Jivanlal Solanki is examined at Ex.17 and his complaint is at Ex.18, wherein he speaks of the earlier quarrel in the wee hours of 30th April, 1994.

15. We have examined the evidence from the angles suggested by the learned Advocates for parties. So far as accused No.1-Nagar alis Polo Karsan Solanki is conerned, there is unimpeachable and unshaken evidence of eye-witnesses Keshav and Sultan supported by medical evidence to indicate that he had inflicted successive knife blows without any reason offered by the other side at the time of the incident. But no dispute or quarrel with the deceased. It is very clear that he had a quarrel with the brother of the deceased in the very early morning hours of the day of the incident. At the time of the incident, accused No.1 came to the spot armed with knife and without any quarrel, dispute or altercation, inflicted knife blow on chest of the deceased. The deceased offered resistence and after a few moments, escaped from the scene of incident and started running across the road and, on reaching the other side of the road, he fell down. Thereafter also, accused No.1 chased the deceased and inflicted repeated

knife blows. It is true that, as per Keshav Ramji, initially, only one blow on chase was given, whereafter deceased ran across the road and fell down, whereas, according to Sultan, after the first blow on the chest, 4-5 other blows were given, whereafter, the deceased ran across the road and fell down and, whereafter also, accused No.1 gave knife blows. This is a minor veriance which depends on observation and description ability of witnesses but does not go to root of the incident nor does it affect the evidence against the accused. In our opinion, therefore, there cannot be any doubt about the intention of accused No.1. He has approached the place armed with a deadly weapon like knife and has inflicted repetitive injuries on vital part of the body even after the deceased fell down and, therefore, the intention on part of accused No.1 was clearly of causing death of the deceased and his conviction for causing murder of Nalin Jivabhai is rightly recorded by the Trial Court.

16. Now comes the question, whether the Trial Court was right in recording conviction of accused Nos.2 and 3 by invoking provisions of Section 34 of I.P.C. with Section 302 of I.P.C. It was contended that the deceased was successfull in catching hold of both the hands of accused No.1 after accused No.1 inflicted the first injury. But accused Nos. 2 and 3 gave fist blows to see that he releases the grip over accused No.1, whereby accused No.1 could be facilitated to inflict further injuries and, therefore, accused Nos.2 and 3 were acting in furtherance of their common intention of causing death of the deceased. It was argued that all the three accused came together and escaped together after committing the offence. This indicates their sharing a common intention. This contention has found favour with the Trial Court. It was argued that, if it were not so, after the deceased started running across the road and fell down, there was no need for accused Nos. 2 and 3 to have chased the deceased along with accused No.1, who, after reaching the other side of the road, again inflicted knife blows and, therefore, Section 34 is rightly invoked.

17. In our opinion, attractive though, the argument cannot be accepeted. It is true that there was a quarrel a few hours before the incident in question and, at that time, accused No.1 had threatened that he would teach the other side a lesson. Accused Nos.2 and 3 accompanied accused No.1. There is nothing to indicate that they had any knowledge about accused No.1 having been armed with knife. Assuming for the moment that they had knowledge, it is a matter on record that they were not armed with

any weapon. Further, there is nothing to indicate that they were sharing a common intention of causing murder of the deceased with accused No.1. All that is indicated was that, on earlier occasion, accused No.1 had said that he would teach the other side a lesson and this is reflected from the sequence of events and the conduct of accused Nos. 2 and 3. Immediately on reaching the spot, accused No.1 gave knife blows and accused Nos. 2 and 3 started giving fist blows and, in that transaction, it is alleged that the deceased caught hold of the hands of accused No.1 and because of the fist blows, that grip was released. Thereafter, the deceased started running, chased by accused No.1, followed by accused Nos.2 and 3 and, after reaching the other side, accused No.1 started giving knife blows in succession. After the initial giving of fist blows by accused Nos. 2 and 3, no overt act is alleged against them at any subsequent point of time except the three of them absconding together in a rickshaw. At the most, what can be interpreted is an intention of "teaching a lesson", probably by causing hurt so far as accused Nos. 2 and 3 are concerned for the reason that accused Nos. 2 and 3 had no weapon with them. If the intention of murdering the deceased was shared by them with accused No.1, they also would have armed themselves with weapon. The fist blows were given on non-vital part of the body, namely, back and, after initial fist blows, there is no overt act on part of accused Nos.2 and 3. They cannot be inferred to have known that after the deceased escapes and runs across the road to the other side of the road, accused No.1 would chase him and inflict further series of blows with knife. In our opinion, the conviction recorded by the Trial Court of accused No.2 and 3 under Section 302 read with Section 34 of I.P.C. cannot be sustained.

18. However, looking to the complicity of accused No.2 and 3, they can certainly be said to have inflicted fist blows. The argument that there is no medical evidence to indicate fist blows also cannot be accepted. It would not be proper to expect medical evidence for such injuries in all cases. There is no reason to doubt the version of the eye-witnesses. The conviction, therefore, has to be for causing simple hurt to the deceased. The conviction of accused Nos. 2 and 3, therefore, has to be altered from one under Section 302 read with Section 34 of I.P.C. to one under Secton 323 of I.P.C. and is, accordingly, altered.

19. The record indicates that accused Nos. 2 and 3 both surrendered to judicial custody on the 6th May, 1994 and were in jail till the 8th March, 1996 when they came

to be released by an order of this Court while admitting appeal. They have remained in jail for about 22 months. We do not propose to inflict any further sentence in light of this fact situation.

20. What emerges from the above discussion is that appeal by accused No.1, i.e. Criminal Appeal No.714 of 1995 deserves dismissal and is, therefore, dismissed. The judgment and order of the Trial Court recording conviction of accused No.1 under Section 302 read with Section 34 is altered to one under Section 302 of I.P.C. with no change in sentence.

21. Criminal Appeals No.815 and 691 of 1995 by accused Nos. 2 and 3, respectively, would stand partly allowed. Their conviction under Section 302 read with Section 34 of I.P.C. is altered to one under section 323 of I.P.C. and considering the fact that they have remained in jail for 22 months following conviction, no further punishment is awarded.

[J. N. BHATT, ACTG. C.J.]

[A. L. DAVE, J.]

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